Nor will the artificial improvement of a river making it navigable enable the legislature to divest riparian owners of their rights. *Canal Comrs. v. People,* 5 Wend. (N. Y.) 423; *Webster v. Harris,* 11 Tenn. 668; *Cooley's Consti. Lim.,* p. 590.

It is almost universally held that if a person improves a stream, at his own expense, so as to make it navigable, he may at any time render it again unnavigable. *De Jure Maris, supra,* p. 9. And the owner may open a way for his own accommodation and refuse to permit others to use it without just compensation. *Wadsworth Admr. v. Smith,* 11 Me. 278. In *Crenshaw v. Slate River Co.,* 6 Rand. (Va.) 254, the court held that after a mill was established and a dam erected and the use of the water granted to the miller, the legislature could not subsequently compel him to build locks through his dam without a full indemnification for the injury done to his vested rights. *State v. Glen,* 53 N. C. 321; *Glover v. Powell,* 10 N. J. E. 211.

In view of the constitutional provision against the taking of private property for public use except by the exercise of the power of eminent domain, it is clear that a state can no more make an unnavigable river a public highway than it can build a public road over one's farm without paying for the right of way.

The rule undoubtedly is that a state can not in any way make an unnavigable stream navigable and thereby destroy or damage the private property rights of adjacent owners without making compensation. If the public good is to be subserved by forcing a public way through private possessions, the only condition on which it can be permitted in constitutional governments is that the owner be compensated for the property which he surrenders to the public. *C. V. P., Jr.*

VALIDITY OF A CONTRACT BETWEEN ALL THE STOCKHOLDERS OF A CORPORATION FOR THE CONTROL OF THE BOARD OF DIRECTORS.

A very important and interesting decision in corporation law has just been handed down by the New Jersey Court of Appeals and Errors. The question involved is a novel one: Is a contract valid which is entered into by two persons, who own all of the capital stock of the corporation, providing for the control of the board of directors of the corporation? This court thinks it is

not. *Jackson v. Hooper and others, New York Law Journal,* Vol. XLII, No. 129, March 8, 1910, reversing the decree of the Vice-Chancellor in the same case, 74 Atl. 130.

The facts in this case are very complicated, but so far as necessary for our purpose may be stated as follows: The parties to this suit, Jackson and Hooper, composed a partnership engaged in the sale of books on subscription. For reasons not here material, they formed two corporations, one in England and one in Illinois, turned over the partnership business to these corporations, and elected three of their employes as nominal directors, with the express understanding and agreement that they were not to have any actual control of the business, but were to act only on the concurring instructions of Jackson and Hooper. A disagreement as to the policy and conduct of the business having arisen, Hooper managed to control the nominal directors, and thus practically excluded the complainant from all participation and control in the business.

This bill is filed on the theory that, as between the parties, Jackson and Hooper were really partners, employing the corporations as mere agencies for carrying on their business, and prays for an accounting of the partnership affairs, an injunction restraining the defendants from excluding the complainant from his proper participation in the business, and for general relief.

The question as to the possibility of conducting a business and using the corporate form merely as an agency has been presented to the courts only once, so far as we have been able to discover. The English House of Lords denied that such a state of facts could exist. Lord Halsbury, L. C., said: "It seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person, with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are." The company was either a legal entity or it was not; if it was, then the business belonged to it; if it was not, there was no person and no thing to be an agent. *Salomon v. Salomon Co.,* L. R. 1897, App. Cas. 22, p. 30.

The logic of this view seems unassailable; so we may grant that the parties were stockholders and not partners, and look at

the validity of the contract relative to the control of the board of directors.

Contracts of this kind are usually so fraudulent on their face that they are seldom presented for judicial inspection, but they have been presented to the courts several times in the form of a promise by a large stockholder or a director, to elect a man to an office, and to keep him in such office, if he will purchase stock in the corporation. In holding such a contract to be void, the Supreme Court of the United States said, "The principle is well settled in regard to public employments. *Ascanyan v. Arms Co.*, 103 U. S. 261. The same doctrine has been applied to the directors of a private corporation, charged with duties of a fiduciary nature to private parties, on the view that it is public policy to secure fidelity in the discharge of such duties. *Wardell v. R. R. Co.*, 103 U. S. 651. See also *Woodruff v. Wentworth*, 133 Mass. 309. We think this principle is equally applicable, on the ground of public policy, although there was not to be any direct private gain to the defendant; for * * * it was the right of the other stockholders * * * to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company." *West v. Camden*, 135 U. S. 507.

The same conclusion is reached in *McCarter v. Fireman's Ins. Co.*, 73 Atl. (N. J.) 80, at 85. But in this case the corporation, an insurance company, owed a duty to the public.

These decisions, it will be observed, are based on the principle that a fraud is being committed on somebody; either the public at large, a particular part of the public, or the stockholders in the corporation. In the principal case, all these elements are lacking; the corporation was not of a public or a quasi-public nature, it was solvent, and all the stockholders knew of and assented to this agreement. On this subject, the Massachusetts Court has said, by way of dictum, "Whether it (an agreement to elect a man to office if he would purchase stock) was not void as against public policy, even if all the stockholders consented to it, is a question of great difficulty, and * * * would require careful consideration." *Woodruff v. Wentworth, supra.*

There might very well be a doubt as to the invalidity of this contract on the ground of public policy under this line of argument. But it was certainly unenforceable on another ground.

It took the control of the corporation away from those named by law to manage it. This corporation was organized under the laws of the State of Illinois, and their corporation act provides (Ill. Rev. Stat. Ch. 32, Sect. 6), that "The corporate powers shall be exercised by a board of directors or managers." This provision is, of course, a part of the charter of every corporation organized under this act.

The extent to which this provision has been applied is, perhaps, best illustrated by the doctrine that a corporation can not become a member of a partnership. This is because of the peculiar relations of partners, and their powers to bind their copartners. "The whole policy of the law creating and regulating corporations looks to the exclusive management of the affairs of the corporation by the officers provided for or authorized by its charter." *Mallory v. Oil Co.,* 86 Tenn. 598.

In asserting the same doctrine, the Massachusetts Court has said: "If the assent of all the stockholders were shown to the formation of the partnership—which is not the fact—it could not enlarge the powers of the corporation, or make that legal which was inconsistent with the law limiting their powers and prescribing their duties." *Whittenton Mills v. Upton,* 10 Gray, 582. This, as is apparent on its face, is merely dictum, but coming from a court of this rank is worthy of consideration on the subject.

It has been held in a number of jurisdictions that the directors are trustees for the corporation, or at least stand in a fiduciary relation to it. 3 *Thompson's Commentaries on the Law of Corporations,* Sect. 4010, and cases there cited.

Under this theory, the contract would be unenforceable, for it is a settled rule of equity that trustees must all act, they can not agree that a part of the body shall act for all; in other words, they can not delegate their authority, even to a co-trustee. See *Bispham on Equity,* Sect. 145.

It has been held in a number of cases that a trustee must exercise absolute control over the subject matter of the trust. This may be illustrated by a case somewhat analogous to the partnership cases above. A trustee has no right to invest trust funds in a "contributory" mortgage, as this takes away that absolute control. *Webb v. Jonas,* 39 Ch. Div. 660.

The *Central Law Journal*, Vol. 70, p. 255, in commenting on this case, calls attention to the fact that Judge Dill, who rendered the decision of the Court, was, before he went on the bench, one of the best known and most able corporation lawyers in the country, and remarks that he would naturally lean "in a direction of showing the ready adaption of corporate organization to the needs of commercial enterprise." This fact gives additional weight to the correctness of the conclusions that he has reached in this case. This conclusion works a hardship on the complainant, but it appears from the authorities that he is without relief, certainly by an action of this nature.